United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7336

To be argued by
DAVID N. ELLENHORN

United States Court of Appeals B

For The Second Circuit

JACOBSON & COMPANY, INC., P/S

Plaintiff-Appellee,

-against-

ARMSTRONG CORK COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE JACOBSON & COMPANY, INC.

MOSES & SINGER
Attorneys for Plaintiff-Appellee Jacobson & Company, Inc.,
51 West 51st Street
New York, New York 10019
(212) 581-9000

DAVID N. ELLENHORN
EUGENE I. FARBER,
Of Counsel

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BRIEF FOR APPELLEE JACOBSON & COMPANY, INC.

This is an appeal by defendant, Armstrong Cork Company ("Armstrong" or "defendant"), from a preliminary injunction issued by the Honorable Edward Weinfeld, United States District Judge, restraining Armstrong from terminating the distributorship of plaintiff Jacobson & Company, Inc. ("Jacobson" or "plaintiff") during the pendency of this litigation.

THE ISSUE ON APPEAL

Did the District Court abuse its discretion in granting a preliminary injunction where (a) plaintiff produced substantial evidence that its distributorship was terminated in violation of the Sherman Act and (b) plaintiff will suffer an irreparable loss of business, good will, and customers without continuing access to Armstrong products, and it is conceded that continuance of plaintiff's distributorship, *pendente lite,* will not cause Armstrong any injury?

STATEMENT OF THE CASE

This action was instituted on May 26, 1976 by the filing of a complaint charging Armstrong with violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), Section 3 of the Clayton Act (15 U.S.C. §14) and the Robinson-Patman Act (15 U.S.C. §13). The complaint seeks both damages and injunctive relief restraining defendant from refusing to sell its products to plaintiff (A3-10).[1]

On May 27, Judge Weinfeld ordered Armstrong to show cause why a preliminary injunction should not be entered restraining it from terminating Jacobson as an authorized distributor of Armstrong products and from refusing to sell its products to Jacobson during the pendency of the litigation (A16-17). Over defendant's objection, Judge Weinfeld also authorized plaintiff to take immediate depositions of three of Armstrong's executives, and to inspect various documents in defendant's control (A17).

The parties thereafter submitted to the court below extensive affidavits, documents, and transcripts of the depositions of defendant's three officials.[2] On June 15, Judge

1. "A" refers to the Joint Appendix.

2. Although defendant requested, and was given, the right to take expedited discovery of plaintiff, it took no such discovery and therefore submitted no depositions to the Court.

Weinfeld heard oral argument, and on July 2, he filed a sixteen page opinion making detailed findings of fact on the basis of which he held that a preliminary injunction should issue (A475-554). Subsequently, Judge Weinfeld issued an order directing Armstrong, *pendente lite,* to continue selling its ceiling systems products to plaintiff on regular and non-discriminatory terms. Judge Weinfeld rejected an application by defendant for a stay of the preliminary injunction pending appeal and for an order directing a trial on the merits within six months (A563-564).

After issuance of the preliminary injunction, Armstrong filed a motion in this Court asking for a stay, pending appeal, and for an expedited appeal to be heard in August. The motions for a stay and for an August hearing were denied, but the Court set the appeal down for the September Term.

STATEMENT OF FACTS

Defendant's statement of facts is misleading and inadequate. It conveniently omits reference to documented facts which cut against defendant's claims, and it distorts other facts in an effort to convey impressions which are not based on the record. In order to correct the record, plaintiff is required to set forth at some length its own statement of the applicable facts.

1. The Relationship Between the Parties

Jacobson is a contractor in the business of installing acoustical ceiling systems, interior partitions, and other interior building products on construction jobs, most of which are obtained through competitive bidding. Jacobson is an old and well established firm, founded in 1889, and has been an innovator in the design and installation of acoustical ceiling systems and materials in the Metropolitan New York area, the States of New Jersey and Delaware and in Eastern Pennsylvania. Occasionally Jacobson has done construction work in other parts of the country. Jacobson is financially sound, with a net worth as of December 31, 1975 of $1,305,000 (A26).

Armstrong is the leading manufacturer of acoustical and non-acoustical ceiling systems in the United States. Its sales in 1975 totaled $859,412,000 of which 19% resulted from sales of ceiling systems and material (A27). Armstrong offers the most complex and attractive range of ceiling systems in the industry. Its advertising, promotional and sales programs surpass those of its competitors, and it is by far the dominant supplier of ceiling systems in the United States. In fact, Armstrong sells about 40% of all the acoustical ceiling products in this country (A27-28, 470).

By 1968 Armstrong had become the dominant supplier of ceiling systems, and to remain competitive plaintiff needed to carry the Armstrong line. In March 1968 Jacobson therefore entered into a letter agreement with Armstrong for the purchase of Armstrong products and its appointment as an authorized Armstrong distributor. Since 1968, Jacobson has purchased more than five million dollars worth of Armstrong products and has been one of Armstrong's major distributors in the Metropolitan New York region (where Armstrong maintains approximately fourteen distributors in addition to Jacobson). Jacobson's credit is excellent, and it has always met its financial obligations to Armstrong (A21, 28-29, 457).

2. The Background Behind the Termination of Plaintiff's Distributorship

In order to appreciate the circumstances leading to the termination of plaintiff's distributorship it is necessary to set forth some background facts pertaining to Armstrong's efforts to prevent plaintiff from selling Armstrong products outside its assigned territory.

The March 1968 letter agreement between Armstrong and Jacobson, establishing plaintiff's distributorship, stated (i) that Jacobson was expected to use only Armstrong products, where available, and (ii) that Jacobson was expected to avoid selling or

installing Armstrong products in the Philadelphia area where, for over 20 years, Armstrong had, and still has, an exclusive distributorship with Berger Acoustics Inc. ("Berger"), a local firm (A28-29, 266-267).

For two years, Jacobson adhered to these territorial restrictions. By 1970, however, Jacobson was no longer willing to acquiesce in Armstrong's restrictions on the resale of its products, and decided to bid Armstrong products on construction jobs in the Philadelphia area where Jacobson had maintained an office since 1937 (A30). When Jacobson pursued this matter, Armstrong insisted that Jacobson refrain from promoting or selling Armstrong materials in the Philadephia region, in view of what Armstrong called its "long standing relations with Berger [Acoustics]". Armstrong made this demand, although it admitted in a letter to Jacobson that "legally, we can't prevent [such sales]" (A31-32). The letter thus stated:

> "*Jake recognizes your problem with a centralized warehouse at Elizabeth and your right to order Armstrong material for shipment into his territory when this is to your advantage. Legally, we can't prevent this, but frankly, we would prefer that you do not promote or sell our materials in that market.*
>
> Looking strictly at our Philadelphia territory, we still do not feel it would be fair to Berger to service your Philadelphia office from our Philadelphia office. *We have operated with Berger as our sole distributor in the Philadelphia market for over 20 years.* During that period, Berger has consistently increased their sales of our products, and their performance last year was exceptionally good. . . .

. . . We recognize that it will not be fully satisfactory or effective to obtain information, samples, etc., through our New York office, but this is the only arrangement we are in a position to offer . . ." (emphasis added) (A31-32, 270-271).

Jacobson continued to insist on its right to sell and install Armstrong products in the Philadelphia area, and demanded that Armstrong's regional sales office in Philadelphia provide pricing information and other technical assistance and services Jacobson needed to compete effectively with Berger (A32, 272). On January 17, 1972, John D. Jacobson, plaintiff's president, wrote to J. H. Binns, defendant's president, and requested that Binns authorize Armstrong's Philadelphia sales office to cooperate with Jacobson. His letter stated:

"For the purpose of simplifying our inventory, we have been selling and installing Armstrong materials in the Southern New Jersey and Eastern Pennsylvania market without the services or assistance from your Philadelphia Regional Office. As a major customer of Armstrong Cork Company, our sales personnel should receive maximum assistance from your sales offices . . . .

We recently bid a job in Pennsylvania (Penns Grove) and we asked for price and technical information from your regional office and from Lancaster direct and we were denied the information. We were unable to bid the job on the basis of Armstrong. This puts us in a very serious competitive situation in this market.

Mr. Binns I am appealing to you for your assistance and personal review in this matter to see if there is some way that Jacobson &

> Company can receive equal treatment along with other Armstrong distributors in the Southern New Jersey and Eastern Pennsylvania area. Your assistance will be greatly appreciated." (emphasis added) (A31-32, 273-274).

This letter to Armstrong's president, merely requesting that Jacobson be given equal treatment with Armstrong's distributor in Eastern Pennsylvania, was viewed by Philip W. Unger, General Sales Manager of the Ceilings Division, as a "pressure tactic", which Unger bitterly resented (Unger Dep. 145, 150).[3] Unger wrote back and informed Jacobson that it could not have access to Armstrong's Philadelphia office and would be required to look solely to Armstrong's New York regional office for pricing information and other necessary services (A275).

In the early seventies, Armstrong provided Jacobson with pricing information for a handful of construction jobs in the Philadelphia area, and Jacobson was able to obtain a few such jobs requiring the installation of Armstrong products (A464-465). However, Armstrong's New York Regional Office had no serious interest in Philadelphia projects and could not provide the services needed by Jacobson in order to compete with Berger. As a result, Jacobson's efforts to expand into the Philadelphia area were unsuccessful, it was forced to acquiesce in Armstrong's territorial restrictions and had to lay off a number of persons whom it had employed for the purpose of expanding into the Philadelphia market area (A34, 462-465).

In 1974 there was a very serious decline in new construction work in the New York area. To meet this problem, Jacobson sought to diversify its operations by opening a Supply Center at its warehouse in Elizabeth, New Jersey. Through the Supply Center, Jacobson sells ceiling products and materials directly to

3. Page references to the transcripts of the depositions of Messrs. Unger, Snyder and Wiley are prefixed "Unger Dep.", "Snyder Dep." or "Wiley Dep.".

the construction trade, schools, hospitals, and other institutions, which install the materials by using their own maintenance personnel. About 80% of the sales made through the Supply Center involve Armstrong materials and products, and Jacobson has aggressively sold some of these Armstrong products at prices below those Armstrong's other distributors would normally charge (A35, 40-41, 471).

Jacobson has actively promoted the activities of the Supply Center. Between August 1975 and March 1976 Jacobson sent about 6,000 brochures, announcements, leaflets, and other promotional items to potential customers in the Philadelphia market area alone. Jacobson also assigned a sales representative solely to develop the Philadelphia market for the Supply Center. Thus, through the Supply Center, building and maintenance personnel in the Philadelphia area have been able to secure Armstrong products from another source besides Berger, and without installation costs(A36, 465).

Jacobson's aggressive sales efforts ran into direct opposition from Berger and from at least one other Armstrong distributor, who registered complaints with Armstrong about plaintiff's sales efforts. In October 1975, Walter Koenig, a sales representative in Armstrong's Philadelphia office, received from Berger a flyer put out by the Jacobson Supply Center advertising a sale of Armstrong products at discount prices. J.E. Snyder, Manager of Armstrong's Philadelphia office, testified that Koenig received "feedback" from Berger and the other distributor about this sale and the special prices at which Jacobson was selling Armstrong materials (Snyder Dep. 115-117). Koenig sent the flyer to Phillip Unger at Armstrong's headquarters and Unger forwarded the flyer to Armstrong's New York office, after first writing the following notation on the flyer:

> "Here is an example of what I mean - we'll hear about this from many of our Philadelphia customers. These people don't give a damn about

> Armstrong. They never have and never will. I doubt very seriously if the $ we'll get in 76 is really worth the grief." (A396-398) (Unger Dep. 109-114)

In addition to opening the Supply Center, Jacobson broadened its activities by bidding on construction jobs outside its usual areas of business. In February 1976, Jacobson wanted to compete for a major construction job in Atlanta, Georgia involving the Richard B. Russell Federal Office Building. On February 17, two of Jacobson's employees met with Donald Lopez, Assistant Manager of Armstrong's New York Regional office, to discuss the use of an Armstrong system for the job. At first Lopez refused to give Jacobson any pricing information for the job because Armstrong did not want Jacobson to compete with Armstrong's Atlanta distributors (A36, 466-467).

When Jacobson insisted that Armstrong provide technical information and pricing for the Atlanta job, Lopez said that Armstrong would do so only if Jacobson commited itself to using Armstrong products if it obtained the Atlanta job. Jacobson could not make such a commitment without first comparing Armstrong's system and prices for this complex project with the systems and prices offered by other suppliers. Jacobson therefore refused to accede to Lopez' demands. It was only then that Armstrong finally, and reluctantly, gave Jacobson the information needed in connection with the Atlanta project (A36, 466-468). Defendant has admitted that this incident, involving Jacobson's desire to compete with Armstrong's Atlanta distributors, was a factor in bringing about Jacobson's termination (A314-315).

On March 19, 1976, just a month after this Atlanta incident, Jacobson was informed by Philip Unger and Richard Wiley, Manager of Armstrong's New York Regional office, that Armstrong was terminating plaintiff's distributorship. Unger

said that Armstrong was doing so because Jacobson was not working on as many small construction jobs as it had in the past, and because Jacobson's purchases of Armstrong products in 1975 allegedly had declined (A37). Jacobson had been given no prior notice or warning that its distributorship was in jeopardy (Wiley Dep. 141).

3. The Balance of Hardships Tips Decidedly Towards Jacobson

Armstrong is the leading manufacturer in the United States of ceiling products and materials, and accounts for about 40% of all sales of such products in the United States (A27-28, 470). Many of Armstrong's products, such as antique glass tile, solid leaf, registry, corkstyle, soundsoak, san serra, highspire, brandshire, and its ATS suspension system are proprietary products which have not been duplicated (A470). Armstrong's promotional and advertising programs are the most extensive in the industry, and its sales force is far superior to those of its competitors (A27-28). As a result, Armstrong's ceiling materials are widely sought by architects, general contractors, and other users, and the specifications on many construction projects often designate ceiling materials produced by Armstrong. Even where Armstrong products are not specified, those products are often preferred, and as a practical matter without access to Armstrong products a ceiling contractor has no hope of obtaining many large construction jobs (A39-40, 470).

All of Jacobson's competitors have access to Armstrong products.[4] Thus, without the Armstrong line Jacobson would be the only major contractor in the Metropolitan New York area that would be unable to bid Armstrong products on new construction work. If Jacobson were denied access to Armstrong

4. Defendant has claimed that there are other ceiling contractors who compete with plaintiff, and who do not carry the Armstrong line. In fact, there are no such contractors. When asked to identify even one such contractor Armstrong's counsel could not do so (A520). The few firms listed at page 11 of defendant's brief are either (a) companies who are no longer in business (e.g. Gilbert J. Phillips), (b) companies who do no contracting work (e.g. O.C.F. Supply, J. P. Eurell), or (c) small contractors who do not compete with plaintiff (e.g. Acoustical Specialities, Inc.).

ceiling materials, it would lose as much as one-half of the construction work it has been doing during the last few years. At a time when the construction business is in severe decline and little work is available, such a loss could be fatal (A40, 470, 551).

Loss of Armstrong's products would also have a devastating effect on Jacobson's Supply Center. During 1975, its first year of operation, Armstrong products represented more than 50% of the sales of ceiling materials made from the Supply Center. In the first four months of 1976, approximately 78% of the Supply Center's sales were of Armstrong products. Although it was opened only recently, the Supply Center is rapidly becoming a major source of profit for Jacobson, and without access to Armstrong products the Supply Center would be virtually wrecked (A40-41, 471, 552).

Armstrong claims that Jacobson would not suffer irreparable injury without the Armstrong line on the theory that there are other manufacturers of ceiling materials from whom Jacobson can purchase supplies. Although Jacobson does obtain some construction work using ceiling materials supplied by other companies, Armstrong is its major source of supply, and Jacobson's reputation in the industry depends in large part on its ability to obtain Armstrong materials (A469).[5]

While loss of the Armstrong line would severely damage Jacobson, continuation of the business relationship between the parties, pursuant to the injunction issued by Judge Weinfeld, will have no adverse effect whatsoever on Armstrong. For over eight years Jacobson has been an outstanding Armstrong distributor. During this period it has purchased millions of

5. Defendant claims that, on the basis of its estimate "Armstrong only accounts for 10% of Jacobson's sales" (Def. brief, p. 9). There is no basis for this claim, which is contrary to the evidence in the record that Jacobson is dependent upon Armstrong products for as much as one-half of its total revenues (A40). Further, the record is clear that in 1975 Jacobson's purchases of acoustical ceiling materials from Armstrong far outdistanced its purchases from any other ceiling supplier. Jacobson's purchases from its major suppliers were as follows: Armstrong — $605,758; Celotex — $59,834; Conwed — $38,584 (A469).

dollars in Armstrong products (A38, 472). There is no question that Jacobson's credit is good and that it will pay for whatever materials it purchases from Armstrong (A21, 472). In view of these facts, it was conceded by Armstrong's counsel at the hearing before Judge Weinfeld that Armstrong will suffer no financial injury as a result of the injunction (A537).

In the court below, Armstrong contended that while it would suffer no financial injury from the injunction, continuance of the distributorship would cause "administrative chaos." In fact, Armstrong has supplied ceiling materials and products to Jacobson during the six months since Armstrong formally terminated the distributorship (A472). No difficulties have been encountered, and there is no evidence of any administrative problems.

4. The Decision of the Court Below

In a detailed opinion, Judge Weinfeld found that Jacobson had presented substantial evidence to support its claim that the distributorship was cancelled to protect Armstrong's distributors in other territories against competition from Jacobson, and thereby to preserve the integrity of Armstrong's system of territorial distribution. In light of this evidence, Judge Weinfeld found that Jacobson had sustained its burden of raising "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation". *Sonesta International Hotels Corp. v. Wellington Associates,* 483 F.2d 247 (2d Cir. 1973) (A542-546, 549-550).

With respect to the "balance of hardships" Judge Weinfeld held that since Armstrong is Jacobson's principal supplier, and all of its competitors are Armstrong distributors, Jacobson would be placed at a severe competitive disadvantage without access to Armstrong products, and its good will and business would suffer irreparable injury if injunctive relief were denied (A551-553).

Judge Weinfeld also held that the injunction would have no adverse effect on Armstrong, which had conceded "that it will not encounter any financial loss by continuing to deal with the plaintiff" (A552). Finally, Judge Weinfeld noted that Armstrong had agreed, despite the termination, to continue selling plaintiff materials for all construction jobs which were on plaintiff's books as of the termination date (A553). This will involve the purchase by Jacobson of more than $500,000 in Armstrong products over an extended period of time, so that the parties will continue to have a business relationship regardless of the issuance of the injunction (A458-459).

ARGUMENT

POINT I

THE DISTRICT COURT APPLIED THE PROPER STANDARD IN ISSUING THE PRELIMINARY INJUNCTION.

It is well established that the District Court has discretion in determining whether to issue a preliminary injunction and that its order will be upheld unless its discretion has been abused. As this Court recently pointed out in *Triebwasser & Katz v. American Telephone & Telegraph Co.,* Dkt. No. 76-7095 (2d Cir. May 17, 1976) slip. op. 3753 at 3756:

> "It is equally familiar law that the granting of preliminary injunctive relief lies within the sound discretion of the District Court and will not be distrubed unless there is an abuse of that discretion, *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931-32 (1975) or unless there is a clear mistake of law."

See also, *S.C.M. Corp. v. Xerox Corp.,* 507 F.2d 358, 360 (2d Cir. 1974);7 *J. Moore, Federal Practice,* ¶65.94[2] at 65-47, 48 (2d ed. 1975):

"A motion for an injunction pendente lite is addressed to the judicial discretion of the district court. While the grant or denial may raise only an issue of law and be reviewable as such, ordinarily discretion will be involved and when it is, the test on appeal is not whether the appellate court in its discretion would have granted or denied the injunction, but whether the district court abused its discretion." (footnotes omitted).[6]

In granting the preliminary injunction, Judge Weinfeld applied the familiar standard for injunctive relief in this Circuit, namely, that a preliminary injunction will issue upon "a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta International Hotels Corp. v. Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973). See also, *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953); *Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197 (2d Cir. 1970). Judge Weinfeld found that plaintiff met this standard for injunctive relief by establishing "sufficiently serious questions" going to the merits, and a clear tipping of the "balance of hardships" in plaintiff's favor.

Defendant does not contend that Judge Weinfeld abused his discretion. Rather, defendant argues that Judge Weinfeld committed error by failing to conduct an evidentiary hearing to determine "the simple and crucial factual dispute about Armstrong's intent in terminating Jacobson, which was sharply

6. Defendant argues that because there was no evidentiary hearing in the Court below a different standard applies, and that this Court should review the matter "de novo" citing *San Filippo v. United Brotherhood of Carpenters,* 525 F.2d 508, 511 (2d Cir., 1975). In *San Filippo* this Court merely held that where there are no issues of credibility depending on the demeanor of witnesses who appeared before the District Court, the scope of review on appeal is somewhat greater than it would otherwise be. It does not follow that the decision of the District Court is not entitled to great weight on a discretionary motion such as this one.

drawn in the affidavits below and could easily and properly have been resolved at an evidentiary hearing" (Def. Brief, p. 15). Defendant thus contends that Judge Weinfeld could not issue a preliminary injunction without (1) conducting an evidentiary hearing, and (2) making a determination that, in fact, Armstrong terminated plaintiff's distributorship in violation of the Sherman Act. In effect, defendant asks this Court to replace the *Sonesta* rule with an entirely new standard requiring the plaintiff to establish at an evidentiary hearing that it is certain to prevail on the merits in order to obtain a preliminary injunction.

It is well established in this Circuit that a preliminary injunction may be issued without an evidentiary hearing and that the taking of evidence is not necessarily required. *S.E.C. v. Frank,* 388 F.2d 486 (2d Cir. 1968); *Herbert Rosenthal Jewelry Corp. v. Grossbardt,* 428 F.2d 551, 555 (2d Cir. 1970). It is also well established that "if a party is unwilling to have the issuance of a temporary injunction decided on affidavits, he must make his objection known; he may not gamble on the judge's accepting his affidavits rather than his adversary's and then seek a reversal if the result is disappointing." *S.E.C. v. Frank, supra* at 493, n.6. See also, *Semmes Motors, Inc. v. Ford Motor Co.,* supra, at 1205 ("A party who chooses to gamble on that procedure cannot be heard to complain of it when the decision is adverse").

In the case at bar, Judge Weinfeld had before him not only the pleadings and affidavits, but also the transcripts of three depositions and a large number of exhibits, which together gave the court a full picture of the controversy. In view of this complete record, defendant did not request an evidentiary hearing and therefore "cannot be heard to complain" that a hearing was not conducted.[7]

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7. John D. Jacobson, plaintiff's president, was in the courtroom during the hearing (A475), and counsel for plaintiff proffered him as a witness. Defendant never asked to cross-examine Mr. Jacobson about the assertions made in his affidavits, and was content to rely on its own affidavits and exhibits to refute Mr. Jacobson's claims.

Defendant's argument that Judge Weinfeld had to resolve the "single and crucial factual dispute about Armstrong's intent in terminating Jacobson" before issuing an injunction is without merit. The reason why Armstrong terminated the distributorship is the ultimate issue in this case. That issue—which is a complex one — must be decided by a jury, after full discovery and a plenary trial, and not by a District Court judge on a preliminary injunction motion. It simply is not the function of a hearing on a preliminary injunction motion to make a final determination of the merits of the underlying dispute.

In summary, Judge Weinfeld did not commit legal error by failing to conduct an evidentiary hearing, or by declining to make a determination of the ultimate merits of plaintiff's antitrust claims. All that was necessary was that the Court be satisfied from the record that plaintiff's evidence raised "serious questions going to the merits".[8]

After carefully reviewing the lengthy record which was before him, Judge Weinfeld made detailed findings of fact and concluded that plaintiff had met that burden. As shown below, Judge Weinfeld's findings in this regard were manifestly correct.

---

8. Armstrong's argument that a higher standard applies because a "mandatory injunction" was issued by Judge Weinfeld is also without merit. Preliminary injunctions directing manufacturers to continue selling products to distributors are frequently issued, and such injunctions have been upheld by this Court. See e.g. *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969); *Semmes Motors, Inc. v. Ford Motor Co.*, *supra.* The form of the injunction in the case at bar was agreed to by defendant and the fact that it is phrased in mandatory, rather than in prohibitory, terms is completely insignificant.

POINT II

PLAINTIFF WAS ENTITLED TO THE PRELIMINARY INJUNCTION.

1. The Evidence Clearly Raises Serious and Substantial Questions as to Defendant's Violations of the Antitrust Laws.

In *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), the Supreme Court held that it is a *per se* violation of the Sherman Act for a manufacturer to restrict the areas in which, or the persons to whom, its customers may resell its products. As the Supreme Court said:

> ". . . Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. [Citing *White Motor Co. v. United States,* 372 U.S. 253 (1963) and *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911).] Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." (388 U.S. at 379) (footnote omitted)

On the basis of *Arnold Schwinn & Co.*, it has repeatedly been held that termination of a distributor because of its refusal to adhere to territorial or similar restraints on the resale of goods is unlawful. See e.g. *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd.*, 417 F.2d 621 (2d Cir. 1969). Once a manufacturer chooses to deal with a distributor, and relinquishes title or dominion over the product, it may not

restrict the territories in which, or the persons to whom, the distributor may resell the product, without violating Section 1 of the Sherman Act.

There is substantial evidence in the record, even at this early stage, showing that Jacobson's distributorship was not terminated for any legitimate business reason, but because of Jacobson's refusal to adhere to unlawful restrictions on the resale of Armstrong products. A brief summary of that evidence follows.

Armstrong has a network of about 300 contractor-distributors located throughout the United States, about 15 of which are located in the Metropolitan New York City area (Unger Dep. 22). Although Armstrong maintains multiple distributors in certain places, in other areas, such as Eastern Pennsylvania and Southern New Jersey, it has appointed exclusive distributors. All the distributors are required to deal with Armstrong's regional sales offices in obtaining prices for Armstrong materials and other technical information and services needed by the distributor. Armstrong's regional sales offices refer architects, engineers, general contractors, and other potential customers for Armstrong products to Armstrong's local distributors and provides other valuable services to the distributors (A29-30).

From the inception of their relationship in March 1968, Armstrong insisted that Jacobson stay out of the Philadelphia area where Armstrong had given an exclusive distributorship to Berger (A29-30). When Jacobson demanded access to Armstrong's Philadelphia sales office in order to obtain the support necessary to compete on construction projects in the Philadelphia area, Armstrong refused such access (A31-32, 297-298). The result was the virtual exclusion of Jacobson from bidding on large construction projects requiring Armstrong products in the Philadelphia region (A34, 463-464).

Armstrong claims that it did not rigidly prohibit Jacobson from selling outside of the New York region but merely preferred that Jacobson limit its sales to its "area of primary responsibility" (A31, 270-271, 296). In fact, Armstrong did not merely "prefer" that Jacobson limit its sales efforts to the New York area. On the contrary, Armstrong at one time refused to give Jacobson any prices for construction jobs in the Philadelphia area, because of Armstrong's special relationship with Berger (A31, 270-271, 463-464).[9] It was only after plaintiff vigorously pressed Armstrong for prices in order to be able to bid on construction jobs in competition with Berger, that Jacobson was provided with any assistance in connection with work in the Philadelphia area (A31-34). Even then, Armstrong refused to give Jacobson services equal to those it provided Berger. As a result, plaintiff was unable to compete successfully with Berger, and was forced to lay off a number of employees whom it had taken on as part of its plans to expand in the Philadelphia area (A34, 410, 464-465).

It is against this backdrop that, in the fall of 1975, plaintiff renewed its efforts to compete with Berger by sending 6,000 advertisements of the Jacobson Supply Center to potential customers in the Philadelphia area (A36, 465). These sales efforts led to complaints from Berger (A465-466). It was also against this backdrop that Jacobson, in February 1976, obtained a major construction job in Atlanta, Georgia by successfully competing against Armstrong's distributors in that area. The record is clear that Armstrong's officials were disturbed by this event, and did not want Jacobson bidding on the Atlanta job (A399, 466-467).

Only a few weeks after the Atlanta project was discussed with Armstrong, Jacobson's distributorship was terminated

9. Armstrong's officials have admitted that they resented Jacobson's efforts to sell Armstrong products in the Philadelphia area, that they regarded such efforts as harmful to Armstrong's relationship with Berger, and that they viewed Jacobson's attitude concerning the Philadelphia situation as incompatible with Armstrong's goals (A464; Snyder Dep. 51, 54-55).

(A468-469). It is hard to conceive that there was no connection between these two events, especially since Armstrong has referred to no specific event, and offered no explanation, of why it terminated Jacobson at the particular time it did.

Armstrong's conduct in this case is precisely what the Supreme Court condemned in *Schwinn.* Armstrong paid lip service to the notion that Jacobson was free to bid Armstrong products outside its assigned territory, but when Jacobson attempted to do so in Philadelphia and in Atlanta, Armstrong abruptly, and without warning, terminated the distributorship (A36, 466-467; Wiley Dep. 141).

Armstrong cannot lawfully prevent Jacobson from reselling its products outside a particular area, or at whatever prices it chooses. *United States v. Arnold Schwinn & Co., supra; GTE Sylvania Inc. v. Continental T.V., Inc.,* 1976 Trade Cases, ¶60, 848 (9th Cir. 1976); *Interphoto Corp. v. Minolta Corp., supra.* Defendants who are guilty of such anti-competitive practices are not permitted to terminate franchises, distributorships, or sales contracts when such terminations would effectuate those practices. *Semmes Motors, Inc. v. Ford Motor Company,* 429 F. 2d 1197 (2d Cir. 1970); *Interphoto Corp. v. Minolta Corp., supra.*

Armstrong argues that Jacobson has not shown a "conspiracy" within the meaning of Section 1 of the Sherman Act. This contention totally overlooks the evidence that the termination came on the heels of complaints registered with Armstrong's Philadelphia office by Berger and by Union Wholesale, a Wilmington, Delaware, distributor (Snyder Dep. 18, 116). This evidence clearly is sufficient to give rise to an inference of conspiracy. As Judge Pollack stated in *United States v. Uniroyal, Inc.,* 300 F. Supp. 84, 89-90 (S.D.N.Y. 1969):

> "Mere complaints by a manufacturer's customers that retailers are engaging in price-

> cutting or discounting do not in themselves constitute a combination and violation of Section 1. Interphoto Corp. v. Minolta Corp., 295 F. Supp, at 719, n.3, Carbon Steel Products Corp. v. Alan Wood Steel Co., 289 F.Supp. 584 (S.D.N.Y. 1968); and cf. Klein v. American Luggage Works, Inc. 323 F.2d 787, 791 (3rd Cir. 1963). However, *if a manufacturer reacts to such complaints by cutting off the offending retailers, a conspiracy or combination may be found to exist.*" (emphasis added).

Furthermore, as Judge Weinfeld held, a conspiracy is not a *sine qua non* for liability under Section 1 of the Sherman Act, which speaks not only of "conspiracies" but of every "contract, combination in the form of trust or otherwise in restraint of trade or commerce" (A550). The Sherman Act thus is violated, not only where there is a conspiracy with a third party, but where the arrangement or combination is put together through the coercive tactics of the manufacturer alone. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n. 6 (1968); *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967), *cert. den.*, 398 U.S. 801 (1967). *Osborn v. Sinclair Refining Company*, 324 F.2d 566, 574, n. 13 (4th Cir. 1963).

In summary, although this action is only in its early stages, Jacobson has already produced substantial evidence showing that its termination was intended by Armstrong to enforce anti-competitive practices involving territorial restrictions on the resale of Armstrong products, in violation of Section 1 of the Sherman Act. At the very least, such evidence raises "serious, substantial and difficult" questions worthy of "more deliberate investigation."

2. Armstrong's Contrived Allegations Concerning the Reasons for the Termination.

Armstrong has continually shifted its position in attempting to tender a legitimate explanation for the termination of one of its leading distributors. None of the explanations it has come up with makes any sense, and its failure to offer a plausible reason is further evidence that the real cause of the termination was an effort by defendant to enforce unlawful restrictions on the resale of its products.

Jacobson was told on March 19, 1976 that it was being terminated because its purchases from Armstrong had declined, and it was not working on as many small construction jobs as it had in the past (A37). This explanation was repeated at a meeting between counsel for Jacobson and counsel for Armstrong on April 17 (A21-22). Through expedited discovery ordered by Judge Weinfeld, Jacobson uncovered evidence conclusively establishing that it was not terminated because of any decline in its purchases from Armstrong. In fact, when Jacobson's record of performance is compared to that of other distributors, it is clear that Jacobson has been, and continues to be, one of the leading distributors of Armstrong products in the United States.

Armstrong has about 300 distributor-contractors throughout the United States. In 1975 their total purchases from Armstrong averaged about $185,000. In the New York area, Armstrong has about 15 distributors, and in 1975 their pruchases averaged about $300,000. Jacobson's purchases from Armstrong in 1975 totalled $605,000, more than three times the national average. In terms of total purchases from Armstrong, Jacobson ranked second among Armstrong distributors in the New York Metropolitan area in 1974, and third in 1975 (A457-458).[10]

10. During the last four years Jacobson's purchases from Armstrong were as follows: 1972 — $792,091; 1973 — $1,139,164; 1974 — $860, 764; 1975 — $605,000. In contrast, many of Armstrong's other distributors have annual purchases totaling less than $100,000 yet none of them has been terminated (A38).

It has been established that Armstrong has never terminated a distributor whose purchases have compared in size to those made by Jacobson (A459-460; Wiley Dep. 30-34). Indeed, the only terminations have occurred where a distributor's purchases have dwindled to the vanishing point, and the distributor's operations have virtually ceased (Snyder Dep. 106-108).

Recognizing the futility of contending that Jacobson was terminated because of an actual decline in its purchases, Armstrong asserted that Jacobson actually was terminated because Armstrong anticipated that Jacobson's purchases in the *future* would be "minimal." This effort by defendant to rationalize Jacobson's termination is also totally contrived. To begin with, it is inconceivable that Armstrong would take the drastic step of terminating one of its largest customers, without any warning, merely on the basis of conjecture as to what the customer's purchases might be like in the future. Further, Armstrong's own sales representatives projected purchases by Jacobson for 1976 in the amount of about $475,000, well above the national average for an Armstrong distributor, and that projection clearly was conservative since, prior to the termination, Jacobson had given Armstrong firm orders for more than half a million dollars worth of ceiling products to be delivered in 1976 and 1977 (A337-341, 458-459; Wiley Dep. 127-131).[11]

In view of the evidence establishing that the reasons for termination given by Armstrong to Jacobson were false, Armstrong shifted position in the court below and contended, for the first time, that Jacobson's termination was actually caused by a "deteriorating relationship" between the parties, involving frequent complaints by Jacobson about Armstrong's performance. In this regard, Armstrong alleged that Jacobson's complaints "were running at least six times the national average" by the end of 1974 (A307).

11. Armstrong's statement that "in the year prior to its termination Jacobson did not land a single job in New Jersey and closed only one job in New York . . ." is therefore blatantly false (Def. brief, p. 7).

An analysis of records produced by Armstrong revealed that Jacobson's disputes with Armstrong over deliveries of merchandise and similar matters were no more frequent, in relation to the volume of Jacobson's purchases from Armstrong, than similar complaints registered with Armstrong by many other distributors (A460-461). Armstrong's officials also conceded that no distributor h[illegible]n been terminated over such routine disputes (Wiley Dep. [illegible]-35). In short, it is obvious that the claim of a "deteriorating relationship" was simply an after-the-fact rationalization for a decision to terminate Jacobson which was made for other reasons.

3. The Balance of Hardships Tips Decidedly Toward Plaintiff Which Will Suffer Irreparable Injury and Against Defendant Which Concededly Will Suffer No Injury.

Defendant does not even try to argue that the "balance of hardships" tips in its favor. Instead, it contends that plaintiff failed to establish that it will suffer irreparable injury without Armstrong products. Defendant's contention is based principally on the theory that money damages will be sufficient to make plaintiff whole if it ultimately prevails on the merits.

The court below rejected the defendant's contention that money damages would make plaintiff whole (A551). In this regard, Judge Weinfeld noted that "Armstrong is the leader in the industry, that almost all of Jacobson's major competitors are Armstrong distributors, and that Jacobson's purchases from Armstrong exceed those from other manufacturers." Given these facts, Judge Weinfeld concluded that Jacobson would be placed at a competitive disadvantage in bidding for construction work if Armstrong's refusal to deal with Jacobson continued, and that such injury would not be susceptible of "calculation in dollars and cents" (A551-552). Judge Weinfeld also found that in view of Jacobson's heavy dependence on Armstrong products, particularly for its Supply Center, Jacobson's loss of the Armstrong line:

"would jeopardize plaintiff's good will and its position as a full line, full service supplier, and the risk that its customers will turn to competitors who do have access to Armstrong as well as other products is substantial and could result in immeasurable harm." (A552).

Judge Weinfeld's conclusions are entirely in accord with the leading authorities in point, such as *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd.*, 417 F.2d 621 (2d Cir. 1969), *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962), and *McKesson & Robbins, Inc. v. Charles Pfizer & Co.*, 235 F. Supp. 743 (E.D. Pa. 1964), which recognize the irreparable losses of good will, customers, and employees a distributor can suffer if its distributorship is not continued during an antitrust case. As the Third Circuit put it in *Bergen Drug Company v. Parke Davis & Co., supra,* at 728:

> "It would be impossible to estimate or compute plaintiff's damages for the loss of good will which it will suffer as a result of being unable to provide its retail customers with service at least equally as good as that furnished by other wholesalers who have a continuing access to defendant's products."

Defendant argues that plaintiff will not be irreparably injured without Armstrong materials because plaintiff has other sources of supply. A similar argument was rejected in *Interphoto Corp. v. Minolta Corp., supra,* where the plaintiff, a distributor of camera equipment, also sued its principal supplier, Minolta Corporation, for terminating its distributorship in violation of the Sherman Act. Despite the fact that Minolta was only one among many of the plaintiff's suppliers, Judge Herlands found that loss of the distributorship would cause irreparable injury, and he therefore issued a preliminary injunction. On appeal, this

Court upheld Judge Herlands and rejected the defendant's argument that money damages would be sufficient.

Defendant contends that the *Interphoto* case is not analagous, on the ground that plaintiff allegedly has a non-recurring group of customers. There is nothing in the record to support this contention. In fact, a large portion of plaintiff's customers do look to plaintiff on a continuing basis because plaintiff is in a position to offer them Armstrong products (A552). More importantly, over 90% of plaintiff's business involves construction work obtained through competitive bidding. Without access to the Armstrong line, plaintiff would have no opportunity to place bids on a large portion of available construction work and would, as a result, suffer substantial losses (A39-40). However, any effort by plaintiff to base a claim for damages on the theory that it would have been the lowest bidder for certain construction jobs if it had been able to bid Armstrong products, would undoubtedly be opposed by defendant as too "speculative" (notwithstanding the broad latitude in establishing damages allowed plaintiffs in antitrust cases). Thus, in addition to the impossibility of computing plaintiff's loss of good will, the peculiarities of plaintiff's business require equitable relief to prevent irreparable injury to plaintiff.

In determining where the "balance of hardships" lies, it is necessary to weigh the injury which the defendant will suffer from the injunction against that which the plaintiff will suffer if the injunction is not issued. Significantly, defendant makes no effort to show any prejudice it will suffer if the injunction is continued. Defendant's failure to address itself to this aspect of the balancing test is an admission that continuation of the injunction will not cause defendant any injury whatsoever.

The preliminary injunction merely directs the defendant to continue selling its products to the plaintiff, just as it has done for over eight years. Plaintiff is a reputable firm, has no credit

problems, and its purchases of more than five million dollars in Armstrong ceiling materials over the last eight years have been profitable to defendant. The preliminary injunction will result in continued profits, and no injury to defendant. Indeed, defendant's counsel conceded in the court below, that defendant will suffer no financial loss from a continuation of the distributorship (A537, 552).

In summary, the preliminary injunction will protect plaintiff from irreparable injury, have no adverse effect on defendant, and benefit the public by fostering free competition in the sale of Armstrong products. Clearly, the court below was fully warranted in concluding that the "balance of hardships" tips decidedly in plaintiff's favor (A551-553).

CONCLUSION

Issuance of the injunction was well within the discretion of Judge Weinfeld, who acted after a careful review of the evidence and on the basis of a thorough opinion, fully supported by the record. Judge Weinfeld applied the proper standards for determining plaintiff's motion and his decision should be upheld.

Respectfully submitted,

MOSES & SINGER
Attorneys for Appellee
Jacobson & Company, Inc.
51 West 51st Street
New York, New York 10019
(212) 581-9000

David N. Ellenhorn
Eugene I. Farber,
Of Counsel

9/2 by mail

CERTIFICATE OF SERVICE

76-7336
Re: Jacobson & Co., Inc. v. Armstrong Cork Co.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Plaintiff-Appellee

That on the 1st day of September, 1976, I served the within Brief for Appellee,

in the matter of Jacobson & Co., Inc. v. Armstrong Cork Co.,

upon Donovan Leisure Newton & Irvine, Esqs.
30 Rockefeller Plaza
New York, New York 10020

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed before me this 1st day of September 1976.

Lorraine Leotta
A Notary Public of the State of New Jersey.
LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977